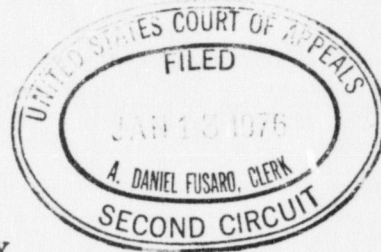


***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

75-7262



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
ROSHAN L. MEHRA, as Administrator of the
Goods, Chattels and Credits which were of
RAJINDER K. MEHRA,

Plaintiff-Appellant,

-against-

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,
Defendants-Appellees.
----- X

PLAINTIFF APPELLANT'S
PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
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PLAINTIFF-APPELLANT'S

PETITION FOR REHEARING

POINT I

THE OPINION IN APPLYING NEW YORK
LAW SUBVERTS APPLICABLE PENNSYL-
VANIA LAW AND MISAPPLIES ERIE RY.
CO. V. TOMPKINS, 304 U.S. 64, 58
S. CT. 817, 82 L. ED. 1188 (1938).

The Opinion incorrectly cites Erie Ry. Co. v.
Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938),
as authority for applying the "substantive law of New York."
On the contrary, plaintiff in Erie, as in our case, was in-
jured in Pennsylvania, and the suit was brought in the Federal
Court in New York. The Court applied the substantive law of
Pennsylvania. Erie clearly does not call for the application

of the substantive law of New York in our case, as the Opinion suggests.

The Opinion sidesteps both Pennsylvania's statutory and common law of negligence (Appellant's Brief, Point II), and relies instead on the forum's law as to sufficiency of evidence. Judge Platt's long Opinion, itself, does not mention New York Law.

It is difficult to apply a sufficiency of evidence test in a vacuum, as the Opinion has done. At a minimum, there need be a standard or a recitation of the substantive law against which the sufficiency of the evidence is to be gauged. Hopefully, there would also be an explanation of how the evidence adduced does not measure up to that standard.

Moore's Federal Practice, Vol. 1A, Part 2, p. 3410 states:

"As is apparent from the general rules governing conflict of laws, states do not ordinarily adopt a policy obstructing the enforcement of basic rights in contract or tort originating in other states. And in the Erie case itself, and numerous other negligence cases, it was unquestioned that negligence and contributory negligence were to be gauged by the laws of the state where the accident occurred."

POINT II

THE OPINION FAILS TO ACKNOWLEDGE
THE LIKELIHOOD OF A FEDERAL STANDARD
TO TEST THE SUFFICIENCY OF THE EVIDENCE,
PARTICULARLY IF FAILING TO
DO SO RESULTS IN A DETERMINATION
THAT THE EVIDENCE IS INSUFFICIENT.

Two Supreme Court cases raise the question as to whether there is a federal standard that governs the sufficiency of the evidence. In both Mercier v. Theriot, 377 U.S. 152, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964) and Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959), the Court does not answer "this important question." Both cases do, however, find that the evidence was sufficient to support the jury verdict.

Calvert v. Katy Taxi, Inc., 413 F2d 841 (2nd Cir. 1969) similarly finds that the evidence was sufficient to enable plaintiff to go to the jury, seeing "no need thus far to determine whether an independent, and presumably more lenient, federal standard might, nevertheless be required."

It is clear that the Supreme Court and the 2nd Circuit are giving attention to the Seventh Amendment, and are not prepared to hold that the evidence is insufficient without first deciding whether there is a federal standard or not. Therefore, it is incumbent on this Court to address itself to the question of whether there is a federal standard as to the sufficiency of the evidence which will lead to a different result.

POINT III

THE OPINION'S RELIANCE ON WANK v. AMBROSINO, 307 N.Y. 321, (1954) AS
THE "LAW APPLICABLE HERE" IS MISPLACED

An examination of the Record on Appeal in the New

York Court of Appeals in Wank v. Ambrosino, 307 N.Y. 321 (1954) reveals that Point I of defendant's brief states: "There is no proof or inference in the record that the decedent was hit by defendant's car..." A realistic reading of both the Opinion of the Court and the dissent suggest that the majority of the Court affirmed the Appellate Division's 3-2 decision, because they did not believe that there was sufficient proof that the car struck the decedent, and, thus, there was a failure of proof as to causation. Contrariwise, in our case, there is no dispute that defendant's car hit the decedent.

Neither Wank nor the Opinion's quotation from Kalinowski v. Ryerson, 242 A.D. 43, 45 (4th Dept. 1934), aff'd. 270 N.Y. 532 (1936) on the issue of causation has relevance because causation is not disputed in our case.

POINT IV

THE OPINION CREDITS THE EQUAL INFERENCE RULE WHICH HAS BEEN DISCREDITED IN NEW YORK, AS WELL AS PENNSYLVANIA.

The Opinion states that "If the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts."

The case of Calvert v. Katy Taxi Inc. (supra)

exposes the non-utility of strict legal rules as "instruments of adjudication," and in particular the "two equal inferences" rule.

"Until recently this 'two equal inferences' rule was a dominant force in the New York courts and precluded an individual injured in an unexplained automobile accident from ever establishing a prima facie case of negligence by proving only that the accident occurred. Even when but one moving vehicle was involved, a plaintiff-passenger had to show the accident ensued from the operator's faulty operation, and was not caused by a mechanical defect in that vehicle, before the issue of the operator's negligence could be submitted to the jury, Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935), for the possibility of an unknown defect was said to be equally inferable with the inference of negligent operation as the possible proximate cause of plaintiff's injuries. Finally, in 1966, however, New York's departure from this rigid formula for determining the sufficiency of the evidence became apparent when Pfaffenbach v. White Plains Express Corp. 17 N.Y.2d 132, 269 N.Y.S.2d 115, 216 N.E. 2d 324 was decided. An awareness of the non-utility of strict legal rules as instruments of adjudication and of the necessity for 'more legal flexibility on what is negligence' in automobile accidents was central to the court's determination."

See Tenant v. Peoria & Pekin Union R.R., 321 U.S. 29, 35 (1944) and Smith v. Pittman, 396 Pa. 296, 152 A.2d 470 (1959).

In our case, defendant driver testified that he did not see decedent at all and/or saw him after it was too late. This is direct proof of facts from which the jury could find

the driver of the car negligent under both the Pennsylvania common law and statutory law. Pennsylvania law obligates a motorist to drive at no greater speed "than will permit him to bring the vehicle to a stop within the assured clear distance ahead." 75 Purdons §1002(a). From said proof, was it unreasonable to have inferred that defendant was negligent in failing to see the decedent, especially in view of the fact that it was the front of the car that struck decedent? Apparently, the jury had no difficulty in concluding that the driver should have seen the decedent.

Judge Platt himself, recognized at the end of plaintiff's case that the jury could infer that the defendant driver was not looking (70a), and he repeated his belief at the end of the entire case that "...it is conceivable to me that the jury could have found the defendant negligent based on the evidence..." (90a)

If one United States District Court Judge found that the question of negligence was a reasonable inference and a second United States District Court Judge held the same opinion at one time, and a jury unanimously found that there was negligence, to now rule that there was insufficient evidence for such an inference is to make a mockery of Judge Judd's ruling that plaintiff is entitled to have another jury decide his case.

CONCLUSION

This Court's Opinion should be reconsidered, and,
upon reconsideration, the verdict below upheld.

Respectfully submitted.

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IS HEREBY ADMITTED

THIS 13 DAY OF *January* 1976

LE Moran

Notary Public

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